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August 17, 1994

William Caton
Secretary, Acting
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Mr. Caton:

Enclosed are the Original and four (4) copies of an Ex Parte filing on GEN Docket No. 90-314.

Very truly yours,

Terrence P. McGarty
Chairman,
Telmarc Group, Inc.

EX PARTE OR LATE FILED

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:

The Attribution Rules of the Fifth Report and Order on Personal Communications Services	))))	August 17, 1994
Petition of Clarification From The Telmarc Group, Inc., and Telmarc Telecommunications Inc	)))	GEN Docket No. 90-314

EX PARTE

PETITION TO CLARIFY THE ATTRIBUTION RULES

The Telmarc Group, Inc ("Telmarc") and Telmarc Telecommunications, Inc. ("Telecom"), being separate and distinct corporations, and jointly, and or separately, called the "Parties", and Telmarc and Telecom holding Experimental licensees to operate as wireless carriers in the markets of Boston, MA, Princeton and Morristown, NJ, and Morgantown, WV, and Telecom being an approved and certified Common Carrier in the Commonwealth of Massachusetts, do hereby file, separately and together, ex Parte, this request to petition the Commission to reassert and re-clarify, to sustain and reaffirm its position in terms of the attribution rules in the PCS Designated Entity Band. [1,2] The parties as small business and as a woman owned business, have been successfully developing PCS services for

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[1] The Parties have standing perforce of § 16 of Clayton and the Parties argue that since entities as the RBOCs are themselves not controlled as common carriers under the 1934 Federal Communications Act, the "Act", that they are not exempt as per §16 of Clayton. Specifically, the Parties have standing and it is further argued that the RBOCs, separately or together, are not exempt from antitrust restrictions, perforce that neither is subject specifically to the Act, and thus exemptions in §16 of Clayton or §7 of Clayton do not apply.

[2] We further argue standing based upon the Brunswick Corp. v. Pueblo Bowel-O-Mat, 429 U.S. 477, 489 (1977) wherein the Parties may actually suffer injury perforce of their current status as carriers, that the actions are directly caused by the two parties being opposed, and that the parties, separate from the LEC entities, are subject to the antitrust laws.

almost three years. The parties agree with the position of the Commission, as stated in its Fifth Report and Order on Personal Communications Services, July 15, 1994, that stringent attribution rules apply in the Designated Band and that the results of the narrowband auction merely reaffirm the position of the parties in support of a prior filing.[3]

Moreover, that parties see the presences of the RBOCs and GTE as a clear and present danger to bidding on the part of the Designated Entities, establishing the possibility that there may be shams and fronting for the sole purpose of preserving their monopoly control, separately or in concert. over the local exchange access business. ***The parties hereby request that the Commission reaffirm its intent, as stated in the Fifth R&O, that there shall be no shams or fronts, especially for the RBOCs, whose presence could merely continue the monopolistic practices and eliminate any form of competitive element in local exchange.***

NATURE OF THE SERVICE

1.0 The delivery of telecommunications services, be they by wire or by wireless, are in effect the same services. They are the same as viewed by the consumer of these services even if they are implemented in a fashion that is different from the perspective of the provider. Standard wire based telephony is the same as cellular and is the same as any wireless based telephony.

Standard telephone service is the provision of voice and/or data communications in a fashion so that it may be delivered in a national network. The delivery of switched telecommunications can now be achieved via the existing telephone network, which is a monopoly, protected by the 1934 Federal Communications Act. There are new and innovative forms of technology that can and do deliver the same service. Cellular is one that has been in operations for over ten years and is a service and market controlled by eleven dominant players; the seven RBOCs (excluding Air Touch), GTE, McCaw (AT&T), Sprint, and Air Touch. A third alternative will be available in the next year or two, as approved by the FCC in its Fifth Report and Order dated July 15, 1994, namely, PCS, or Personal Communications Services.

1.1 PCS provides, at a minimum, the ability of any new entrant to deliver toll grade quality voice services in a seamless interoperable national network. This service or product offering is the provision, at a minimum, of voice grade service. It is the same

[3] NPC Inc. Ex Parte filing in 90-314, May 30, 1994. In this filing the petitioners articulated the danger of not having a clear and well articulated Designated Entity band to the development of competition in the PCS markets. Moreover, the petitioner detailed the essential market control elements that the RBOCs have over the existing markets. Actions by Bell Atlantic and NYNEX merely reaffirm the assessment of the petitioner.

as the service offered by the current Local Exchange Carriers, LEC, and is the same that could be potentially offered by the existing cellular carrier.[4]

This states that PCS, and other wireless means for telephony, are nothing more than "plain old telephone service". It clearly has the potential of providing telephone service at a more competitive price than a wire based service. It is totally cross elastic with a wire based service. Namely, the consumer cannot differentiate with either offering other than possibly through the extra mobility afforded by PCS. In essence, PCS makes wire and wireless telephone service a simple commodity, indistinguishable to the consumer solely on the basis of the technology. The distinguishing feature will most likely be the price and only the price, as it is with all commodities. PCS allows for the commodicization of local exchange service.[5]

1.2 PCS, cellular, and wire based local exchange services are indistinguishable from the perspective of the buyer. Therefore, PCS can and should compete with the LEC and the wire based service.

If the intent is to create a competitive alternative to the local loop and, simultaneously, to expand the telecommunications services offered, then PCS offers a significant alternative means to do so. Experimental efforts to date have indicated that the consumer does not necessarily view PCS as a separate service offering. If priced competitively, and positioned competitively, the consumer views PCS as a displaceable alternative to the wire based telephone.[6]

1.3 The "Market" for PCS is the same as the "Market" for the LEC based services of today. The "Market" for cellular is the same as the PCS "Market".

There is no material or other observable or measurable difference in the offering of PCS and wire based service and the markets for both are the same. The consumer may choose between the two.[7]

1.4 PCS enables the commodicization of voice services and establish the possibility for any new entrant to sell the same service to the consumer, with the consumer

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[4] In McGarty, 1990 [1], the references being detailed at the end of this filing, the demonstration is made that the networks as evolved with wireless can be constructed in a fully open and distributed fashion. It was in this paper that the concept of commodicization was first presented.

[5] Telmarc Telecommunications, Inc., NPRM Comments to the FCC, November 9, 1992.

[6] Telmarc Quarterly Report, July 1, 1993, which details extensive market research in this area.

[7] The Court, in United States v. E.I. duPont de Nemours & Co. (Cellophane), 351 U.S. 377 (1956), introduced the concept of cross elasticity to determine the market. Although there is no true market measure at this time, extensive market research indicates that there is anticipated to be great cross elasticity as defined by the Court in the aforementioned.

purchasing the commodicized service solely on the basis of price. PCS allows for the total cross elasticity of supply to the consumer of telephone service.

It is argued that the service offered by the dominant entity or the RBOC LEC is fully displaceable by PCS and that as such competes with the LEC in its primary market.[8]

1.5 New entrants into the PCS business do not face economies of scale in capital plant that have been faced by prior entrants, thus justifying the prior monopoly position of the LEC. PCS entrants, by means of outsourcing, can also obtain all support and sales services at marginal prices and thus each Local Service Operator, LSO, does not have a scale economy in the operations and sales sides of the business. Thus there are no economies of scale in the PCS business and the justification for any monopoly player is no longer valid on economic principles.

It has been shown that new entrants have the ability to establish capital plant in such a way as to have marginal capital and average capital be almost the same at very small market penetrations, less than 0.5%. Thus there are de minimis scale economies in capital plant. In addition there may be scale in support and operating services, but by outsourcing, and using the economy scope of a third party, such as an ISSC or EDS or CSC (as did NEXTEL), an entrant may purchase such service at the margin. Thus any new entrant may see entry costs all at the margin.[9] This implies that there is no natural monopoly. In fact this implies that competition may be quite significant.

1.6 Competition in the PCS market, for voice amongst other services, will be commodicized and the consumer choice will be made on the basis of price, if such is possible. Choice on price for the consumer is Pareto optimal.

With the aforementioned characteristics, the product or service offering will be based upon price. New entrants will compete primarily on price, and their prices will reflect their costs. The consumer welfare is always maximized by maximizing choice while also minimizing price. Price could be so minimized in this market by having full competition and clearing the market on a fully competitive price basis.[10]

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[8] In the decision of Telex Corp. v. IBM Corp., 367 F. Supp. 258, 355-356 (N.D. Okla. 1973), the Tenth Circuit Court ruled that IBM had monopolized the market on the basis of the sale of peripheral products that were commodicizable in the terms in which we use herein.

[9] McGarty, 1994 [1], and Telmarc Quarterly Report to the FCC, April 1, 1994.

[10] McGarty, 1993 [2] discusses the competitive aspects of fully competitive markets versus monopoly and duopoly markets. It is shown that in the current monopoly market the price is twice what it could be for telephone service in a competitive market. This fact has been borne out in the IEC market where long distance rates have been halved in the last ten years.

MARKET FOR THE SERVICE

2.0 The market for the services may be described in terms of the sellers or in terms of the purchasers understanding of the product. Wireless is commodicized telecommunications and should not be differentiated from any other telecommunications services. With regards to the sellers, the RBOCs Local Exchange Companies, the LECs, have and continue to have a monopoly hold on the market. There are no significant competitors in this business other than the LECs controlled by the RBOCs.

In the duPont Cellophane case, the Court viewed the market for competitors as that which was cross-elastic, specifically, would the product that is sold substitute for the product that is offered.[11] In the case of the current wire based telecommunications services offered by the LECs, the provision of a wireless based substitute would be totally cross-elastic. [12] In a similar fashion, the attempt to differentiate services on a geographical basis has also been dismissed by the Court in Grinnel.[13] Furthermore, in Grinnell, the national nature of the service offering was taken into account. In telecommunications, there is both cross elasticity and the nature of the service is inherently national in scope. Thus any regional company is in reality providing a national service capability. It is virtually a national entity.

STANDING OF RBOCs AND GTE AS COMPETITORS

3.0 The Regional Bell Operating Companies and their cellular subsidiaries are not carriers as interpreted in terms of the FCC Act of 1934. The Bell Operating Subsidiaries, namely the twenty two operating companies are carriers so defined but are under the jurisdiction of the state Public Utility Commissions and not directly by the FCC.

The Act controls the effects of the Local Exchange Carriers acting as common carriers. [14] The LECs are separate subsidiaries of the RBOCs which are not themselves controlled by the Act. The mobile communications subsidiaries are also not controlled by the Act. [15]

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[11] U.S. v. E.I. du Pont, 351 U.S. 377 (1956)

[12] Telmarc FCC Quarterly Report, July 1, 1993, which provides the market research on the cross-elasticity of wireless with wire based telephony.

[13] U.S. v. Grinnell, 384 U.S. 563 (1966). Justice Fortas' dissent on Grinnell was based on the local nature of the service. The majority argued that the service was essentially a national service and that must be taken into account.

[14] §202 of the Federal Communications Act (1934, as amended).

[15] See U.S. v. Pan American World Airways, 371 U.S. 296 (1963) wherein the Court recognized the control by the CAB but that it was the prime action of the airlines as an entity controlled in its primary business thereto. In U.S. v. RCA, 358 U.S. 335 (1959) the Court recognized the power of the courts to revoke a license granted by the FCC, thus indicating a capability over and beyond the Commission in such

4.0 The limitations of Clayton § 7 regarding the exclusion of regulated entities from Clayton, relates to the Operating Companies under the direct control of the FCC. The RBOCs as entities, and the cellular companies as specific subsidiaries of the RBOCs are exempt from such FCC administrative oversight and thus are liable under the remainder of Clayton, and specifically Clayton § 7.

This follows from the above argument as a corollary thereto.

5.0 The merger of NMCC and BAMS implies a merger of interests in NYNEX and Bell Atlantic respectively. Bell Atlantic and NYNEX currently compete, through their Operating Companies, in the New York market, via the "Corridor" agreement. Specifically Bell Atlantic can sell access in the New York market by means of the "Corridor" agreement and NYNEX could in return. Bell Atlantic does so at the current time.

The Corridor Agreements preceded and survived the MFJ and allowed the two carriers to provide services in each others regions on a competitive basis. The merger would, through the interlocking directorates, reduce or totally eliminate that competitive capability. Furthermore, the New York Partnership, under which NMCC and BAMS operate the New York MSA could be bifurcated into two operating regions, albeit one license. The pricing of BAMS was and still is separate from NMCC, as is NMCC from BAMS. This implies that the two could be direct potential competitors. From the Court's decision in Falstaff, it is clear that the Court perceives that such elimination of even a potential competitor is in violation of the antitrust statutes. [16]

6.0 From a geographical perspective, and in view of the "Corridor" agreement, the merger is implicitly a Horizontal merger amongst the dominant monopoly players in these markets. This represents an example wherein the RBOCs will have established greater control over the market, which can only be aggravated if they further control Designated Entities.

Bell Atlantic and NYNEX have a unique agreement that passed through the Modified Final Judgment, the Corridor Agreement. This allows Bell Atlantic to sell service in New York from New Jersey and likewise for NYNEX to sell services in New Jersey. The merger of these two entities would combine these markets, de facto, and would thus reduce what semblance of competition could result. The Court has ruled that such reduction of competition is in violation of the Antitrust laws.[17]

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cases. We argue that the FCC has statutory power only regards the LEC common carriage function. We argue that the non-Common Carrier functions are therefore not so protected.

[16] U.S. v. Falstaff Brewing Corp., 410 U.S. 526, 532-533 (1973).

[17] ibid.

ANTICOMPETITIVE POTENTIAL

7.0 The Existing Entities control many of the means of production, including but not limited to the access fees.

There are four sets of players in the wireless market characterized by their market power. The first are the ***Existing Entities***, namely the RBOCs and GTE, who each and together have significant market power through their existing monopoly presence. The second are the IECs and other existing communications entities who provide telecommunications services but have no control over local access.[18] Third are the non telco players such as the CATV and utility companies. Fourth are the Designated Entities such as small businesses, women and minority companies. Of these four classes, only the ***Existing Entities*** control access, a key means of production for the delivery of the basic telecommunications services.

Access and Interconnect are two separate concepts, but highly interrelated. Access is defined as the provision of all systems and services necessary to have one carrier interface with another for the purpose of transferring information, or simply just a voice call. Interconnect is the physical process of connecting the two such carriers. Thus access may embody more elements and to some degree more abstraction than interconnect. Interconnect is simply the physical elements of communications.[19]

There are three views of access that are currently in use. These are:

1. ***Access as Externality***: This is the long standing concept of access that is the basis of the current access fee structures. The RBOC contends that it has certain economic externalities of value that it provides any new entrant and that the new entrant brings nothing of value to the table in the process of interconnecting. The RBOC has the responsibility of universal service and furthermore permits the new entrant access to the RBOCs customers, which brings significant value to the new entrant. In fact, RBOCs argue that a new entrant would have no business if the RBOC did not allow it access to "its" customer base. The RBOCs, especially Bell South are strong supporters of this view.

2. ***Access as Bilateralism***: This is the view currently espoused by the FCC in some of its more recent filings. It is also the view of the New York Public Service Commission in the tariff allowing Rochester Telephone and Time Warner Communications to

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[18] This would include AT&T, MCI, Sprint, as well as the new entities such as Columbia PCS, a new PCS entrant backed in part by Fidelity investments, a participant in SMR and other telecommunications services. The designated entity companies are true small businesses, women or minority owned businesses as specified by the Commission, unlike the aforementioned players.

[19] This division of interconnect and access is due to David Reed of OPP at the FCC.

interoprate. It also is the view of Ameritech in its proposed disaggragation approach. Simply stated, Bilateralism says that there are two or more LECs in a market. LEC A will pay LEC B for access or interconnect and LEC B will pay LEC A. It begs the question of what basis the reimbursement will be made, what rate base concept, if any, will be used, and what process will be applied to ensure equity.[20] This is akin to reinventing the settlements process of pre-divestiture days. It is also know as the "Brere Rabbit" approach, saying not to throw us into the thicket of bilateral payments, but knowing that that is where the RBOC were born and raised. Bilateralism is rant with delays, with expensive legal reviews and administrative delays. It clearly plays to the hand of the established monopolist. Suffice it to say that U.S, West owns a significant share of Time Warner and one would suspect that their presence in this Bilateralism approach is seen.

3. ***Access as Competitive Leverage***: This concept of access assumes that there is a public policy of free and open competition and that the goal is providing the consumer with the best service at the lowest possible price. It argues that no matter how one attempts to deal with access in the Bilateral approach, abuses are rampant. Thus the only solution in order to achieve some modicum of Pareto optimality from the consumer welfare perspective is to totally eliminate access fees. The Competitive access school say that the price that the consumer pays for the service should totally reflect the costs associated with its providers and not with the provider of the service of the person that the individual wants to talk to. For example, my local telephone rate does no change if I desire to talk to someone in Mongolia, even if their rates are much higher due to local inefficiencies. The Competitive Access school says that externalities are public goods, created perforce of the publicly granted monopoly status of the past one hundred years. It states further that Bilateralism is nothing more that an encumbrance that allows the entrenched monopolist to control the growth of new entrants, and is quite simply an artifact of pre-divestiture AT&T operations. The only choice for the Competitive Access school is no access at all and price at cost.

The Parties argue that there is only one view of access that is consistent with a competitive environment and does not create the potential for anticompetitive actions on the part of the Existing Entities, specifically, the provision of access in a fully competitive environment which implies the total elimination of access fees. Under that condition, the cross control from the LEC to the wireless entity is eliminated and competition is more likely to result.

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[20] See the Recent book by Baumol and Sidak, Toward Competition in Local Telephony, MIT Press (Cambridge, MA), 1994. The authors assume Bilateralism and then work from there. They do not even broach the question of what is best for the industry. Their approach is an academic treatise on what are optimal reimbursement mechanisms, rather that what allows competition.

There are several implications that follow from these positions. Specifically, as regards to the new entrants into the local exchange marketplace, the observations that have been made previously in the public record are as follows: [21]

- Scale does not exist in capital plant if the plant is allowed to cover the area where the majority of customers are. Scale is significant in capital if there is a demand to cover all customers, no matter how economically efficient. Scale in capital plant is an artifact of social policy mandated by Universal Service.

- Scale exists in the operations support services perforce of common shared processing equipment and common use of software and human resources. There is a natural need for agglomerated National Service Entities to service the Local System Operators. The "Market" will allow such entities to be developed and serve the LSOs as is done with current outsourcing.

- Scale is not a problem for the LSO. The LSO has de minimis scale from local capital and has access to the Operating Support Services on a marginal price basis from a NSE. Conclusion: The LSO can compete with the entrenched carrier since the LSO faces no scale and can price the service to market in a short period of time. The LSO does not need large capital resources to do this.

- Commoditization of the product offering, namely voice, allows for competition on the basis of price only. The LSO competitor can compete against the LEC RBOC if there is no access fee. Access fees are diseconomies of scale to the new entrant. They act as a financial barrier to entry to any new competitor.

- A new entrant, in an access free environment can compete against the entrenched monopolist with orders of magnitude less investment by leveraging off of as NSE structure and using the new wireless technology. Quality is maintained by the outsourcing of the back office operations. There is no qualification for entry to new competitors other than local operations expertise. The scale and scope in the existing monopolists can be nothing more than an added capital burden on the new entrant.

- Bilateral access fees are determined on two key factors: the providers cost base and the providers allocation of assets to access. The analysis of access clearing or settlements using this algorithm leads in all cases to a control of the price and the existence of a monopolists controlled barrier to entry through a manipulation of access fees. Only through the elimination of access fees can any new entrant hope to compete on price and thus benefit the buyer.

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[21] Telmarc Group Inc., FCC Filing, Ex Parte, May 30, 1994, Docket 90-314.

7.1 The Existing Entities have control of almost 100% of the market in wire based distribution of the telephone service, with some diminution due to local bypass entities. The existing entities have control over almost 75% of the current wireless market as a means of distribution of telephone services.[22]

There is some mis-perception that the cellular carriers differ in some way with PCS. The cellular carriers, having 25 MHz of spectrum each, half of which was given to the RBOCs free of any cost, and half won in lotteries, and subsequently purchase, half of that being by RBOCs, is just bandwidth. The RBOCs can and are doing with 800 MHz bandwidth what can and may be done with the 1.8 GHz bandwidth. Bandwidth is fungible. Pac Tel had stated in 1990 that they could provide service to all of Los Angeles using CDMA and the existing 25 MHz 800 MHz spectrum.[23]

7.2 Telephone services, as a commodicized entity, do not differ in any way if delivered by a wire or wireless means. The consumer perceives the service as the same in either case. Thus there is complete cross elasticity in a commodicized market.

7.3 The delivery of telephone service, when differentiated by wire based or wireless, is the same service but sold through a different sales and marketing channel. There is no basic product differentiation between a wire based service and a properly delivered wireless service. The only difference is price as reflected throughout the distribution channel.

The essence of what makes wireless and wire based services different is merely the sales or distribution channel. The sales channel is a different company, although owned by the same holding company. Pac Tel was the only RBOC to publicly recognize this and separate the two entities. The current differential between the two services is price, and this is driven by capital and operations inefficiencies in the analog technology. These will disappear in the digital technologies.

7.4 The current wireless market is controlled by Duopoly Players, one being an existing entity, called the B side wireline carrier, who was granted at no cost the 25 MHz of spectrum, and another A side player, called the non-wireline player. More that 50% of the current wireline players are existing entities, namely RBOCs or GTE. All of these entities may deliver a telephone service comparable to that on the wire based side. Some of them currently do.

The current cellular market is at best a duopoly and in some sense a monopolistic market. With few exceptions, the market shares are the same. The exceptions are most

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[22] Wireless Communications; Donaldson, Lufkin & Jenrette, Report, Summary, 1994.

[23] Statement of Craig Farrill, Vice President of Pac Tel, at CTIA in January 1991, talking on their choice of CDMA, as related by Farrill to the author in June of 1991, and as supported as having been heard by John Stupka, President, Southwestern Bell Cellular to the author in September of 1991.

pronounced in the markets of NMCC and BAMS. Notwithstanding the differences, the control of the telecommunications market, be it wire or wireless based, is under the control of the RBOCs or other Existing Entity.

8.0 The value of a telecommunications property is dependent on the net present value of the property. That value is a function of the revenue, expenses, capital, auction fee, access fee, and cost of capital as perceived by the bidder. If all operators face the same revenue stream, capital requirement, and expense stream, the property values will reflect access fee, auction fee, and cost of capital differences. This will advantage those with low costs of capital and control over access.[24]

The existing entity may have the ability to use their existing monopoly powers to ensure preservation of their monopolies in the upcoming bidding for wireless licenses. This would create a new barrier to entry to any new entrants, and continue the existing barriers to entry. The existing entities face the lowest cost of capital of any provider and in addition have a monopoly rent value that increases their valuation per PoP. In addition these existing entity bidders, as a group, have control over some of the means of production, including but not limited to access fees. Thus these players, per force of their existing monopoly franchise, have a higher value per PoP, assured by the government franchises, and thus can outbid any player in a free and open auction.

9.0 Access Fees are a key means of production. They are currently viewed as a means of compensating the RBOC for use of its facilities and payment for certain yet to be defined network externalities. Access fees include the costs of interconnect plus other costs and services that go beyond interconnect. Access fees are not unbundled costs for interconnect.[25]

The RBOCs have bundled many costs into access. For example, the IEC may face a $0.05 per minute access whereas the cellular carrier may face a $0.11 per minute for comparable service. Recently, NYNEX proposed changing access in New England from $0.07 to $0.035 per minute. These fees load such items as Bellcore and internal Science and Technology costs, which may for the most part have no relation to access. In fact, these R&D costs relate to new products and services and not to unbundled access.

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[24] Such an action, if actually exercised, is predation.

[25] As shown in McGarty, 1993 [1] through [4], and 1994 [1], access fees tie together elements such as interconnect, R&D, sales and services, and other elements of the telephone companies services, and have been indicated as such by the LECs in filing to various Public Service Commissions. Interconnect is what is sought, and unbundled from any and all other elements. It can be argued that this "tied" offering, which provides ability for interstate traffic and commerce, which is not expressly conveyed to the access buyer, which can be separated into a multiplicity of products as evidenced by the actions of Ameritech, and over which the LEC has significant economic power to control both availability and price, and which ostensibly has not clear business justification, implies that access fees are potentially tying claim, as per Jefferson Parish Hospital No. 2 v. Hyde, 466 U.S. 2 (1984).

9.1 Competition from other entities, specifically the designated entities, who may perforce of their lower operating costs and lower cost for infrastructure capital, may be able to offer a more competitive service than any other entity if they were to obtain a license.

The designated entities have entrepreneurial capabilities that will permit lower costs and a competitive market. It has been argued by many such groups that represent these entities that a set aside is the only way for them to compete. Notwithstanding this, a set aside may be appropriate for the designated entities but a set aside for the RBOCs only, delimited to at most one band, is essential for there to be any long term competition.

Although there is intent to create competition, and although the RBOCs, as common carriers, are potentially, and in part, protected from antitrust violations by the controls in the 1934 Act, the state of telecommunications after a free and open auction may be drastically different. It is clearly to the RBOCs advantage to merge, to integrate, to improve the position of their existing channels, and to perform other acts that ensure them greater share of the market prior to the entry of any competition.[26] This is the same set of issues that were prevalent in the 1970s during the early stages of the AT&T breakup.[27]

REQUEST OF THE PARTIES

The Parties request that the Commission reaffirm its position on the establishment of sham backings for the sole purpose of sustaining a monopolistic control over the business. The parties hereby request that the Commission reaffirm its intent, as stated in the Fifth R&O, that there shall be no shams or fronts, especially for the RBOCs, whose presence could merely continue the monopolistic practices and eliminate any form of competitive element in local exchange.

Specifically, the Parties request that the Commission clearly reaffirm and support the fact that:

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[26] Recent pricing of cellular at such rates as $29.95 per month for unlimited local service in Boston by Southwestern Bell is an example of pricing to obtain market share. Recent estimates put Southwest in Boston at almost 400,000 subscribers of a market of 4 million, almost 10% market share. It will be very difficult for any new entrant to get that share away from them. In addition, although Telmarc has been arguing for access fee elimination in Massachusetts, neither the NYNEX Mobile company nor Southwestern have raised that issue, as a means to provide a more competitive service. In a duopoly market, such a fee is common to both players and is not a barrier. In a fully competitive market, this would change. The Parties argue that the fact that NMCC in the Massachusetts market has not attempted to act as a LEC implies that NMCC cannot and does not act independently of the LEC portion of NYNEX and that in what can be observed externally, the LEC interests dominate even over the unregulated and non-LEC operations.

[27] Temin, P., Fall of the Bell System, Cambridge, 1987, p. 129. Here the author recounts Van Deerling suggestions of abandoning FCC control and oversight and reintroducing the antitrust laws which control competitive markets. It can be argued that the same effect is taking place here.

1. ***Control by an dominant entity, namely RBOCs or GTE, in any fashion significant to effect undue pressure on any Designated Entity be found to be in opposition to the current attribution rules.***

2. ***That control by secondary means, that is through service agreements that are more than of the standard form, be forbidden as part of the attribution rules.***[28]

3. ***That all RBOC and GTE agreements with Designated Entities be at arms length and under the tariff structures that exist for other such services. The tariff structure will require the publication of the services provided and the rates under which the services are provided, and such services shall be available to any and all other parties at identical prices.***[29]

4. ***That the RBOCs and GTE have no direct interest in any of the Designated Entities, such interest being more than 5% of the total diluted equity in a Designated Entity, in a fully diluted fashion, to ensure that such an interest does not allow for a bundling of the access arrangements to continue the barrier to entry that currently exists..***

The above set of arguments have been based upon detailed studies performed by Telmarc over the past three years.[30]

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[28] The parties argue that the RBOCs could, through off-book financing, or through interlocking service agreements, have de facto control over a designated entity. For example, an RBOC may provide, via contract or other such agreements, that are highly restrictive to the Designated Entity, billing, customer service, network management, co-location of switching, switch access, and other such services, that although not owning the Designated Entity, control the Designated Entity. The Parties request that Designated Entities reveal any and all such contracts if they result in de facto control, albeit not de jure, and consistent with the letter of the FCC's attribution rules. Specifically, the Parties argue that secondary control is as significant as primary control.

[29] It is argued that the Commission currently has the right to do this under §201-§205 of the Act.

[30] The following references have been used in the text. They have been referenced by year and by the number in which they appeared in that year:

1990 [1], McGarty, T.P., Alternative Networking Architectures; Pricing, Policy and Competition, ***Information Infrastructures for the 1990s***, Harvard University, J.F. Kennedy School of Government, - Nov. 1990.

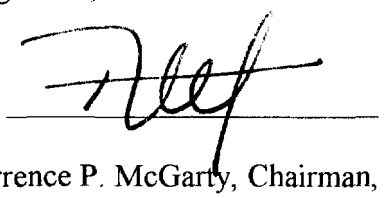
1993 [1], McGarty, T.P., Access to the Local Loop, ***Kennedy School of Government, Harvard University, Infrastructures in Massachusetts***, March, 1993.

1993 [2], McGarty, T.P., Wireless Access to the Local Loop, ***MIT Universal Personal Communications Symposium***, March, 1993. FCC Ex Parte, February 4, 1993.

1993, [3], McGarty, T.P , Spectrum Allocation Alternatives; Industrial; Policy versus Fiscal Policy, ***MIT Universal Personal Communications Symposium***, March, 1993. FCC Ex Parte, February 4, 1993.

Respectfully submitted,

The Telmarc Group, Inc.,
Telmarc Telecommunications Inc., and
National PCS Consortium, Inc.
August 17, 1994

By: 

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Dated: August 17, 1994

1993 [4], McGarty, T.P , Access Policy and the Changing Telecommunications Infrastructures, ***Telecommunications Policy Research Conference***, Solomon's Island, MD, September, 1993. FCC Ex Parte, August 15, 1993.

1994 [1], McGarty, T.P., A Précis on PCS Economics and Access Fees, ***MIT Conference on Access, MIT Lincoln Laboratory***, March 18, 1994. FCC Ex Parte, May 30, 1994.

CERTIFICATE OF SERVICE

I, Terrence P. McGarty, hereby certify that a copy of the foregoing has been sent by hand delivery (*) or by United Sates mail, first class and postage prepaid, to the following on this day, August 17, 1994:

The Honorable Reed Hundt
Chairman,
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, DC. 20554

The Honorable James H. Quello (*)
Commissioner,
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

The Honorable Andrew C. Barrett (*)
Commissioner,
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

The Honorable Rachelle B. Chong (*)
Federal Communications Commission
1919 M Street, N.W.
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The Honorable Susan Ness (*)
Federal Communications Commission
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Dr. Robert M. Pepper, Chief (*)
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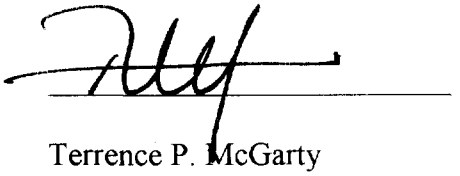
Attested to this day, August 17, 1994,



Terrence P. McGarty
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